

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MICHAEL THOMPSON,

Defendant-Appellant.

UNPUBLISHED

September 18, 1998

No. 194904

Berrien Circuit Court

LC No. 95-003684 FC

Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with a dangerous weapon, MCL 750.82; MSA 28.277, carrying a concealed weapon (pistol), MCL 750.227(2); MSA 28.424(2), felon in possession of a firearm, MCL 750.224f(2); MSA 28.421(6)(2), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was also convicted as an habitual offender, second offense, MCL 760.10; MSA 28.1082. Defendant was sentenced to concurrent terms of twelve to forty-eight months' imprisonment for the assault conviction, six to sixty months' imprisonment for the carrying a concealed weapon conviction, twelve to sixty months' imprisonment for the felon in possession of a firearm conviction, and a consecutive two-year sentence for the felony-firearm conviction. Defendant appeals his convictions as of right. We affirm.

Defendant first contends that his convictions are not supported by sufficient evidence and contravene the great weight of the evidence. Defendant only contests the sufficiency and credibility of the evidence on the issue whether he possessed a gun, an element common to all the offenses for which defendant was convicted. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). A jury verdict is against the great weight of the evidence only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would result if a new trial were not granted. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

In the case at bar, the victim testified that defendant removed a black automatic pistol from the pocket of his sweatshirt, pointed it at the victim's head, and told him that he would shoot him if he did not "shut up." In addition, the victim and another witness testified that they heard a gunshot. Viewing this evidence in a light most favorable to the prosecution, this evidence clearly satisfies the contested possession element. Although the credibility of this testimony was hindered by certain inconsistencies and uncertainties, such credibility determinations are the exclusive province of the trier of fact and must stand even if the trial court would have reached a different conclusion. *Lemmon, supra*. Therefore, after carefully reviewing the record, we find that the jury's verdict was supported by sufficient evidence and that the trial court did not abuse its discretion in concluding that the verdict did not contravene the great weight of the evidence.

Next, defendant argues that he was denied effective assistance of counsel and that the court erred in failing to hold an evidentiary hearing on the matter. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's representation so prejudiced the defendant as to deprive him of a fair trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After reviewing the record, we conclude that defendant failed to sustain his burden of proving that counsel made a serious error that affected the result of trial.

First, defendant argues that his trial counsel was ineffective for failing to object to the prosecutor's repeated references to defendant's gang involvement. However, we conclude that the prosecutor's uncontested references to defendant's gang activity were admissible to show defendant's motive for being angry at the victim, a former member of defendant's gang, for not assisting him in a bar fight. See *People v Hoffman*, 225 Mich App 103, 105-110; 570 NW2d 146 (1997). Further, even if the evidence were not admissible, there is no prejudice because the prosecutor also elicited testimony that the alleged gang was not a criminal or for-profit enterprise, but a group of friends who grew up together and would attend clubs and shows together.

Next, defendant contends that his trial counsel was ineffective for failing to timely notify the prosecutor of an alleged alibi witness. We disagree. First, defense counsel told the court on the record that, during his pretrial consultation with defendant, defendant did not inform him about the alleged alibi witness. Second, it does not appear that the witness would have provided an effective alibi in light of defense counsel's statements that the witness would only testify that defendant stopped by her house "for a couple of minutes . . . kind of close" to the time the incident occurred. Such testimony would not have eliminated the potential that defendant was at the scene of the crime, and therefore, we fail to see how the absence of the evidence would have changed the result of the trial where two witnesses testified that defendant was at the scene of the crime. See *People v Daniel*, 207 Mich App 47, 58-59; 523 NW2d 830 (1994).

Affirmed.

/s/ Mark J. Cavanagh

/s/ William B. Murphy

/s/ Helene N. White